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In The

Supreme Court of the United States

October Term, 1988

WESTERN PENNSYLVANIA TEAMSTERS AND EMPLOYERS PENSION FUND; THOMAS L. FAGAN; W. F. HARDY (Deceased); JAMES H. HUTCHINSON, JR.; SAMUEL A. MONTANI (Deceased); CHARLES E. SALVATORE; JOSEPH E. ZAUCHA; RICHARD R. PELUSO; AND RAYMOND H. BAKER,

Petitioners,

v.

CARL COLTERYAHN DAIRY, INC.; PENSON BENEFIT GUARANTY CORPORATION; AMERICAN BENEFIT CORPORATION; MELVIN M. BROOKS, C.P.A.; FRANK STOKES, Individually and as Agent of AMERICAN BENEFIT CORPORATION, and LEON B. WILNEFF, Individually and as Agent of AMERICAN BENEFIT CORPORATION,

Respondents.

BRIEF OF CARL COLTERYAHN DAIRY, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD B. SANDOW, ESQUIRE

JONES, GREGG, CREEHAN & GERACE
16th Floor - Grant Building
Pittsburgh, PA 15219
(412) 261-6400

Attorneys for Respondents
Cari Colteryahn Dairy, Inc., et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER QUESTION PRESENTED

Whether, under the federal common law of pension plans, a defrauded employer may sue in Federal Court for damages arising out of a fraudulent inducement to join a Pension Fund?

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RULE

Supreme Court Rule 17 4

COUNTER-STATEMENT OF THE CASE

At issue is whether the Third Circuit's decision to permit a defrauded Employer a cause of action for damages in Federal Court, which has not been shown to be in conflict with any other Federal Circuit Court or United States Supreme Court decision, should be reviewed by this Court.

A. History of the Case

Respondent, Carl Colteryahn Dairy, Inc., ("Employer") was a member of the Greater Pittsburgh Industry Dairy Fund ("Dairy Fund") prior to 1976. After extensive negotiations, the Dairy Fund and Western Pennsylvania Fund Trustees executed Articles of Merger in December, 1976, which ultimately resulted in a consummation of the merger some time prior to April, 1984.

In 1984, Colteryahn Dairy withdrew as a contributing employer to the Western Pennsylvania Teamsters and Employers Pension Fund ("Western Pennsylvania Fund"), whereupon the Fund imposed a withdrawal liability assessment of $589,239.00 under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1453 (1982). Challenging the assessment of the Western Pennsylvania Fund, Colteryahn Dairy filed an action pursuant to 29 U.S.C. § 1401 which provides for arbitration of the calculation of withdrawal liability. This matter is still in litigation.

On November 14, 1987, Colteryahn Dairy filed a Complaint against the Western Pennsylvania Fund, various Trustees ("Trustees") and various actuaries and auditors ("Accountants") associated with the Fund, in the United States District Court for the Western District of

Pennsylvania. The Complaint alleged that the defendants had fraudulently induced Colteryahn Dairy to accede to a merger of the Fund through a series of misrepresentations and concealments in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1982). The Complaint further alleged the Fund had improperly calculated the assessment due to an erroneous interpretation of 29 U.S.C. § 1391 which provides the methods for computing withdrawal liability. Finally, the Complaint alleged defendants had also breached certain State common law contract and tort duties.

Defendant/Petitioner Western Pennsylvania Fund's Motion to Dismiss plaintiff's Complaint was granted on March 12, 1987. Judge Ziegler, U. S. District Court for the Western District of Pennsylvania, dismissed the Complaint on the basis that the matter was subject to ERISA arbitration proceedings, and therefore federal jurisdiction was unavailable. Judge Ziegler also *sua sponte* dismissed the claims against the other defendants. All pendent jurisdiction claims were dismissed as well. Colteryahn Dairy filed a Motion for Reconsideration which Judge Ziegler denied on March 18, 1987.

B. The Decision Below

The Third Circuit reversed the District Court's dismissal of the fraud, misrepresentation and concealment counts holding that these counts are not the type of technical calculations which Congress intended for MPPAA arbitration. The Circuit Court further held that subject matter jurisdiction was conferred upon the District Court pursuant to U.S.C. § 1451, and directed the

District Court to determine jurisdiction over the pendant State causes of action in accordance with the Third Circuit Opinion. In addition, the Circuit Court approved the District Court's Order directing that Count II (concerning whether certain payments were contributions) await arbitration, but modified the District Court's dismissal of this Count. Instead, the Third Circuit ordered a stay of proceedings on Count II until arbitration was completed.

The essence of the Third Circuit's decision that Employer's fraud claims are not covered by the arbitration provisions of ERISA are contained in the Circuit Court's analysis of the statutory framework of ERISA:

> These sections provide no basis for either adjusting or eliminating an assessment based on fraud or misrepresentation, and we have been cited to no legislative history or other authority even remotely suggesting any such basis. Moreover, not one of the statutory provisions even arguably implicated by Colteryahn's fraud claim falls within sections 1381-1399. *See infra* Parts III.B, III.C. Plainly, Colteryahn's dispute with the Fund does not concern any "determination made under" any of these provisions. Rather, Colteryahn's claim that it was fraudulently induced to become and remain a contributing member of the Western Pennsylvania Fund differs significantly from the types of highly technical MPPAA issues that the statute has assigned to arbitration. We therefore reject the district court's holding that it was without jurisdiction to hear that claim in its various forms. *See* Appendix at 10a.

The Third Circuit's decision that federal jurisdiction exists to hear the Employer's fraud claims is based on the broad jurisdictional provisions of 29 U.S.C.A. § 1451(a)(1) and basic legal principles incorporated into ERISA:

It is axiomatic that, as a general rule, a party should not be allowed to profit from its own wrongs. *See* Appendix at 15a.

The Pension Benefit Guaranty Corporation ("PBGC") filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc* which was denied on July 25, 1988.

The Western Pennsylvania Fund and its Trustees have filed a Petition for Writ of Certiorari in the case at bar seeking to have this Honorable Court review the Third Circuit's ruling.

REASONS FOR DENYING THE PETITION

PETITIONERS FAIL TO MEET ANY OF THE CRITERIA FOR OBTAINING CERTIORARI

Rule 17 of the Supreme Court Rules enumerates several considerations which may serve as reasons for granting certiorari, such as a Federal Court of Appeals decision conflicting with decisions of other circuits, or a Federal Court of Appeals decision departing from the accepted and usual course of judicial proceedings. Petitioners have not cited any Court of Appeals decision which conflicts with the Third Circuit opinion in this case. To the contrary, as cited in the Third Circuit Opinion, analogous cases from the Third and other Circuits are consistent with the decision in the instant case. *See* Appendix at 14a, 15a, 16a and cases cited therein.

Instead, petitioners choose to rely on Rule 17.1(c) by labeling their case as "an important question of federal

law which has not been, but should be, settled by this Court." Although the area of pension law poses many important questions of federal law, the facts and circumstances of the case at bar clearly demonstrate that the appropriate procedures for litigating this action were unquestionably followed by the Third Circuit Court of Appeals when it permitted the Respondent, a defrauded employer, to sue in Federal Court for damages from a multi-employer fund and its agents.

Petitioners' argument characterizing this issue as ripe for Supreme Court review is threefold. Respondent will address each argument independently.

1. The Third Circuit Decision Does Not Contradict Statutory Remedies

Contrary to the assertions in Petitioner's Petition, the case at bar does not present an issue of the creation of a private right of action in federal court. The jurisdictional section, 29 U.S.C. § 1451 (a)(1) already creates broad jurisdiction and provides that an "employer . . . who is adversely affected by the act or omission of any party under this subtitle with respect to a multi-employer plan . . . may bring an action for appropriate legal or equitable relief or both . . . "

This broad grant of jurisdiction contains no language excluding acts or omissions due to a Fund's misrepresentations which induced an employer to join the Fund via a merger of plans. To the contrary, the legislative history and public policy of ERISA and MPPAA indicate that these statutes must be read broadly to afford appropriate federal relief. *See Massachusetts Mutual Life Insurance v. Russell*, 473 U.S. 134, 156 (1985). ("The legislative history

demonstrates that Congress intended federal courts to develop federal common law in fashioning relief under ERISA." D. Brennan, J., concurring.); *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3rd Cir. 1980) *cert. den* 454 U.S. 1142 (1982); *See also* Third Circuit Opinion at Appendix 15a; 29 U.S.C. § 1401 (a), (emphasizing the equitable character and soundness of plans) and 29 U.S.C. § 1001 (C)(3) (declaring as a policy the encouragement of the "maintenance and growth of multi-employer pension plans.") Respondent respectfully submits that these policies cannot be fostered by permitting Pension Funds and Fund representatives to commit fraudulent actions without being subject to suit in court. To the contrary, changing the axiom cited by the Third Circuit that "a party should not be allowed to profit from its own wrongs" would discourage employer participation in multi-employer funds, encourage employer withdrawal at any economically feasible time, and seriously imperil the maintenance and growth of multi-employer pension plans.

Rather than creating federal jurisdiction, the federal common law principles adopted by the Third Circuit are an interpretation of 29 U.S.C. § 1451 and the remedies created. As the Third Circuit states:

> Indeed, we would find it quite curious if Congress had given multi-employer plans the immense power to assess upon a withdrawing employer a substantial penalty while providing the employer with few defenses – yet did not intend to place some check on the conduct and practices of such plans. Moreover, we doubt that Congress intended that innocent employers, penalized by the fraudulent exercise of such powers, would be without remedy. Finally, given the predominant federal interest in the conduct

of pension plans' affairs, any check on such power must be available in federal court. *See* Appendix at 15a-16a.

None of the cases cited in the Petition concern claims of fraudulent activity as described in the case at bar. None of these cases concern a broad underlying jurisdictional grant to employers to bring suit for any appropriate legal or equitable relief. Nor has any Circuit or Supreme Court precedent contrary to the Third Circuit decision been cited. To the contrary, as noted by the Third Circuit, although some dispute exists among the Circuits concerning the right of employer to restitution for mistaken payments, no such dispute is presented when confronted with fraudulent activity. *See* Appendix at 16a.

This Court has consistently permitted the development of federal common law to effectuate the civil enforcement schemes of ERISA. In both *Massachusetts Mutual v. Russell, supra,* and *Pilot Life Ins. Co. v. Dedeaux,* 107 S. Ct. 1549 (1987), this Honorable Court acknowledged the expectation "that a federal common law of rights and obligations under ERISA-regulated plans would develop." *Pilot Life, supra,* at 1558; *See also Massachusetts Mutual, supra,* at 156. In the case at bar, the civil enforcement scheme of 29 U.S.C.A. § 1451 can be effectuated only by the adoption of the limited federal common law principles espoused by the Third Circuit.

2. The Third Circuit Decision Effectuates Congressional Purposes

The Petitioners suggest that, by enacting 29 U.S.C.A. § 1451, Congress intended that innocent employers, penalized by the fraudulent exercise of Pension Fund powers, would be without remedy. Petitioners provide no

legislative history to support their contention that Congress intended a revolutionary reversal of the general rule preventing a party from not profiting from its own wrong. The language of 29 U.S.C.A. § 1451, which adds to ERISA the right of an Employer to sue and provides for federal jurisdiction for appropriate legal *or* equitable relief, appears to be a broadening, not limiting provision. Certainly if Congress intended to insulate pension funds from any liability for fraudulent activities, it could have used more expressive language.

The congressional purpose of maintenance and growth of multi-employer plans is promoted, not contradicted, by a federal common law right to redress fraud. The continued existence and growth of multi-employer plans is dependent on existing employers continuing their participation and new employers joining such plans. A holding that employers have no redress for fraudulent inducement committed by a Pension Fund would discourage this participation.

There is nothing in the legislative history to suggest that Congress intended for innocent employers who are defrauded by pension funds to be without judicial redress. In *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982), this Honorable Court similarly held that employers could raise the illegality of the underlying pension contribution contract despite the absence of an express provision in ERISA providing such a defense. In *Kaiser*, this Honorable Court was "unpersuaded that Congress intended to give pension fund trustees the benefit of illegal bargaining that were not, and should not have been, relied upon to ensure the solvency of the trust funds." *Kaiser, supra*, at 99 n. 13. The same analysis should apply to the case at bar.

The "flood of litigation" argument advanced by petitioners is a mirage. The Third Circuit decision creates a very narrow federal common law right for employers who are defrauded by pension funds and their representatives. There is no basis to believe that the Circuits will permit a flood of vague and ill-defined claims to be asserted.

3. The Administrative Remedy (Arbitration) Is Inadequate in the Instant Case

Administrative procedures are not to be blindly required as prerequisites to suit in all cases. Rather, as this Court has frequently acknowledged, "The doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue." *Weinberger v. Salfi*, 422 U.S. 749, 763 (1975). "The policies underlying the exhaustion requirement" associated with the specific statutory administrative procedure must be examined to determine whether the administrative remedy need be exhausted. *Bowen v. City of New York*, 106 S. Ct. 2022, 2032 (1986).

Respondent respectfully submits that the Third Circuit's analysis of MPPAA's administrative scheme is correct and this administrative scheme provides an inadequate remedy which was never intended to encompass claims of fraudulent inducement by defrauded employers.

MPPAA's arbitration provisions do not grant a MPPAA arbitrator the power to assess damages against a Fund and its agents for fraud, the relief requested by Respondent Colteryahn Dairy's Complaint. An examination of 29 U.S.C.A. §§ 1381-1399 and 29 U.S.C.A. § 1451(a)(1) indicates that MPPAA arbitration is limited

to the technical determination of the assessment of withdrawal liability. As the Third Circuit stated, "These sections provide no basis for either adjusting or eliminating an assessment based on fraud or misrepresentation." *See* Appendix at 10a. Further, "Colteryahn's claim that it was fraudulently induced to become and remain a contributing member of the Western Pennsylvania Fund differs significantly from the types of highly-technical MPPAA issues that the statute has assigned to arbitration." Appendix at 10a.

As a practical matter, the standards presented in the statutory sections and Pension Benefit Guaranty Corporation guidelines provide no guidance to the arbitrator to assist him in deciding issues of fraudulent inducement. Rather, the standards concern technical calculation issues and MPPAA arbitrators are elected for their expertise in this limited highly-technical area.

Petitioners improperly confuse the case at bar with a challenge to a withdrawal liability assessment. Respondent Colteryahn Dairy's Complaint does not challenge the assessment, but rather claims that other parties may be liable in damage for injuries caused to Respondent. If Respondent is successful, it will not eliminate or reduce Respondent Colteryahn Dairy's withdrawal liability nor alter Colteryahn Dairy's requirement to pay this liability.[1]

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[1] In fact, Colteryahn Dairy has independently challenged the calculation of the assessment through the arbitration process and has made the interim payments required by MPPAA's arbitration procedures.

Rather, Respondent will be entitled to a judgment against the parties responsible for fraudulent and related activities which caused injury.

Since the administrative scheme is inadequate to provide the relief sought and the statutory guidelines for MPPAA arbitrators indicate Congress never intended such arbitrations to include issues of fraudulent inducement, the doctrine of exhaustion of administrative remedies is inapplicable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for the Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD B. SANDOW, Esquire
JONES, GREGG, CREEHAN & GERACE
16th Floor – Grant Building
Pittsburgh, PA 15219
(412) 261-6400

Attorney for Respondent
Carl Colteryahn Dairy, Inc.

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